IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AVA SLAUGHTER,	§	
Plaintiff,	§	
	§	
	§	
v.	§	CIVIL ACTION NO. H-05-3455
	§	
JONES DAY,	§	
	§	
Defendant.	§	
	§	

DEFENDANT JONES DAY'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Jones Day ("Jones Day" or "Defendant") files this Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, and respectfully shows the Court the following:

I. INTRODUCTION

Plaintiff Ava Slaughter's("Slaughter" or "Plaintiff") discrimination and retaliation claims fail because the undisputed evidence in this case establishes that Jones Day did not discriminate or retaliate against Plaintiff based on her race or any alleged protected activity. On the contrary, as conclusively established in Jones Day's motion for summary judgment and herein, Jones Day selected another individual for the position of GIS Manager because she was better qualified for the position. Plaintiff's retaliation claim also fails because Plaintiff cannot demonstrate that she engaged in protected activity or that she suffered any adverse employment action.

To be sure, in the Opposition to Jones Day's Motion for Summary Judgment (hereinafter "Opposition"), Plaintiff relies upon unsubstantiated assertions and legal conclusions, but fails to provide any competent summary judgment evidence to support her claims. Plaintiff attempts to

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disguise issues of pure law as disputed issues of fact, highlights irrelevant facts, and mischaracterizes undisputed evidence in an effort to create the appearance of a genuine issue of material fact in this case. As previously demonstrated in Defendant's Motion for Summary Judgment (hereinafter "Motion"), fully incorporated herein by reference, Jones Day is entitled to summary judgment in this case because the *undisputed evidence* proves that Jones Day neither discriminated nor retaliated against Plaintiff. As such, summary judgment in Jones Day's favor is proper and should be granted in this case.

II. ARGUMENT

A. Plaintiff Cannot Establish Her Claim of Discrimination

Plaintiff cannot prevail on her race discrimination claim because she cannot demonstrate that she suffered an adverse employment action or that Jones Day's decision to select another employee as the Houston GIS Manager was based on Plaintiff's race. In her Opposition, Plaintiff relies solely on her own subjective beliefs and assertions of discriminatory conduct by Jones Day and presents no competent evidence to support her claim of discrimination. In fact, Plaintiff's Opposition fails to cite *any* relevant evidence or authority to support her claim that Jones Day discriminated against her because of her race. Rather, Plaintiff's Opposition consists merely of her attorney's conclusory statements[1] about what the evidence purportedly shows and what this Court's legal conclusions ought to be. It is axiomatic that Plaintiff's counsel's statements are not competent summary judgment evidence. *See*, *e.g.*, *Banda v. Garcia by Garcia*, 955 S.W.2d 270, 217 (Tex. 1997). Because Plaintiff fails to present sufficient evidence to support her claim of discrimination against Jones Day, Plaintiff's race discrimination claim fails as a matter of law.

[1] Many of these conclusory statements are also completely irrelevant to this litigation.

1. Plaintiff Fails to present evidence to support a *prima facie* case of race discrimination.

Plaintiff argues that she was discriminated against when she was demoted from the position of Houston GIS Manager and replaced by Jerri Del Riesgo ("Del Riesgo"), a white employee (Opposition at 1). Assuming for purposes of Jones Day's Motion for Summary Judgment and this Reply only that Plaintiff held the title of GIS Manager prior to September of 2003,[2] Plaintiff cannot establish a *prima facie* case of race discrimination because there is no evidence that she suffered an adverse employment action or that she was qualified for the GIS Manager position.

In order to make out a *prima facie* case of discrimination when the adverse employment action at issue is a demotion, the employee must show (1) that she was demoted, (2) that she was qualified for the position she occupied, (3) that she was in a protected class, and (4) that she was replaced by a person outside her protected class. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). Because Plaintiff cannot demonstrate that her basic job functions changed at the time of the alleged demotion, she is unable to establish that she suffered an adverse employment action in September 2003. It is undisputed that Plaintiff's hours and base compensation have remained the same since the employment action at issue (Motion, Ex. A at 281). Because an employment action that "does not affect job duties, compensation, or benefits" is not an adverse employment action under Title VII, Plaintiff cannot demonstrate that she suffered a demotion. *Hunt v. Rapides Healthcare Sys., L.L.C.*, 277 F.3d 757, 769 (5th Cir. 2001). The only evidence that Plaintiff presents to support her argument that she was demoted are documents which unofficially referenced Plaintiff as GIS "Manager" (*See* Opposition at 2-3). Plaintiff offers no evidence that her job duties changed after Del Riesgo began working in the

[2] As established in Defendant's Motion for Summary Judgment, Slaughter's official title remained, at all times, Technical Support Specialist.

Houston office, nor can she demonstrate that she experienced any such change in job duties, compensation, or benefits. Since Plaintiff cannot show that she suffered an adverse employment action as a result of Jones Day's decision to hire Del Riesgo as GIS Manager, her race discrimination fails as a matter of law.

Moreover, Plaintiff fails to raise an issue of fact as to whether she was qualified for the position of GIS Manager. While Plaintiff argues that she was presumptively qualified for the position when she was initially hired, the undisputed documentary evidence establishes that Plaintiff was hired as Technical Support Specialist rather than GIS Manager (*See* Motion, Exhibit I at Exhibit 1). In an attempt to support her argument that she was qualified for the position, Plaintiff challenges Kevin Richardson's ("Richardson") assessment of her performance and his opinion that she lacked the primary qualifications of the GIS Manager position, but wholly ignores the opinions of the other interviewers.[3] To the extent Plaintiff seeks to defeat summary judgment by merely disputing Richardson's assessment of her capabilities and relying instead on her own self-approving statements, this effort fails. It is well settled that self-interested characterizations of job performance and qualifications do not create a genuine issue of material fact sufficient to defeat summary judgment. *See Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir.), *cert. denied*, 503 U.S. 980 (1992).

Furthermore, Plaintiff's argument regarding Richardson's assessment of her qualifications ***ignores*** the very important fact that Hugh Whiting ("Whiting"), the ultimate decision maker, and the other Jones Day partners who interviewed Slaughter, relied on all of

[3] For example, Plaintiff attempts to downplay the importance of her 2003 Performance Evaluation from Terry Crum ("Crum"), Jones Day's former Global GIS Director, in which Mr. Crum strongly criticizes Plaintiff's job performance. Slaughter's argument that Crum's evaluation is hearsay is incorrect. First, Crum's evaluation of Plaintiff is a business record that has been properly authenticated by Richardson in his affidavit in support of Jones Day's Motion (*See* Motion at Ex. I). Second, it is undisputed that Mr. Crum's evaluation was considered by the individuals who made the GIS Manager employment decision (*See Id.* at Ex. C at ¶5; Ex. D at ¶5; Ex. E at ¶5) and, as such, it is admissible to show the information that these individuals relied upon in evaluating Plaintiff's qualifications for the GIS Manager position.

Plaintiff's 2002 and 2003 performance evaluations in assessing her qualifications for the position (*See* Motion, Ex. C at ¶5; Ex. D at ¶5; Ex. E at ¶5). Plaintiff has not offered any evidence that any of these individuals acted with an improper motive in relying on Plaintiff's work evaluations, including those submitted by Richardson, in assessing her qualifications for the GIS Manager position.[4] As more fully explained in Defendant's Motion, these evaluations collectively establish that Plaintiff did not exhibit sufficient communication, organizational, or customer service skills to render her qualified for the position of GIS Manager. Indeed, the undisputed summary judgment evidence demonstrates that all of the documentation before these individuals led them to the conclusion that Plaintiff was *not* qualified for the GIS Manager position (*See* Motion, Ex. C at ¶6; Ex. D at ¶¶5-8; Ex. E at ¶¶5-8). Since Plaintiff cannot establish each essential element of her *prima facie* case of discrimination, Jones day is entitled to summary judgment.

2. Jones Day's nondiscriminatory demotion of Plaintiff cannot constitute discrimination.

Assuming *arguendo* that Plaintiff can establish a *prima facie* of race discrimination, Jones Day is still entitled to summary judgment because Jones Day has articulated a legitimate, nondiscriminatory reason for its decision to hire Del Riesgo as the Houston GIS Manager, and Slaughter has failed to point to any evidence that raises an inference of pretext. Specifically, as fully explained in Defendant's Motion, the undisputed evidence demonstrates that Jones Day hired Del Riesgo as Houston GIS Manager because (1) the Interviewers collectively recommended Del Riesgo for the position, and (2) Whiting believed that Del Riesgo was better qualified for the position than Plaintiff (*See* Motion at 12-17). To be sure, Title VII does not prohibit an employer from discharging an employee, even one who is performing her current

[4] Not does Plaintiff allege any discriminatory intent or behavior by these three individuals at all.

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position adequately, and replacing her with an individual outside the plaintiff's protected class whom the employer subjectively believes will do a better job. *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Similarly, the fact that Jones Day concluded that Del Riesgo was better qualified for the GIS Manager position than Slaughter is not evidence of unlawful discrimination, and this decision does not violate Title VII or Section 1981. *See id.* Because the undisputed evidence demonstrates that Jones Day chose to place Del Riesgo in the GIS Manager position because it believed she would be a better performer than Plaintiff, Jones Day is entitled to summary judgment on Plaintiff's discrimination claim.

3. Plaintiff has no evidence of pretext.

Finally, Plaintiff cannot prevent summary judgment on her discrimination claim because she has presented no evidence that Jones Day's legitimate, nondiscriminatory reason for its GIS Manager employment decision is false or merely a pretext for discrimination. In order to establish pretext in a case alleging demotion, Plaintiff must show that in reality, intentional discrimination lay at the heart of the employer's decision. *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). This is a "heavy" burden which cannot be met solely by conclusory statements, opinions, or subjective beliefs. *Little v. Republic Refining Co.*, 924 F.2d 93, 96 (5th Cir. 1991); *Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 566 (5th Cir. 1983). Plaintiff must present summary judgment proof that is more than a mere refutation of Jones Day's explanation. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993). Rather, she must set out ***specific facts*** that would enable a reasonable jury to find that Jones Day's reasons are false. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993). Because Plaintiff has not met

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her burden of proving that Jones Day's actions were motivated by intentional discrimination, Jones Day is entitled to summary judgment on Plaintiff's discrimination claim as a matter of law.

Plaintiff's purported arguments of pretext are tenuous at best. First, Plaintiff's assertion that there are no African American GIS Managers at Jones Day is insufficient as a matter of law to support her claim of discrimination. *See*, *e.g.*, *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978) (holding that statistics without evidence of purposeful discrimination do not support a claim of discrimination). Second, Plaintiff's allegation that Jones Day somehow concealed the actual date of its decision to hire a GIS Manager in order to have more time to create evidence to support a demotion of Plaintiff is entirely unsupported by the evidence. Furthermore, this argument ignores the undisputed fact that Whiting and the other interviewers based their conclusion on each candidate's performance evaluations for 2002 as well as 2003 in making the employment decision at issue. Plaintiff fails to identify any "subjective evidence" allegedly "built" by Richardson from February to September 2003 upon which Jones Day allegedly relied for its employment decision. Such a conclusory statement is insufficient to establish pretext as a matter of law. *See Elliot v. Group Medical & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983)

Finally, Plaintiff is simply wrong in her assertion that Jones Day's refusal to use "objective" or "quantifiable" employment criteria in evaluating Plaintiff's qualifications for the GIS Manager position somehow constitutes evidence of discrimination (*See* Opposition at 6-8). Plaintiff's argument ignores the undisputed fact that each employee considered for the GIS Manager position in September 2003 was evaluated with the same criteria (*See* Motion, Ex. C at ¶5, Ex. 3; Ex. D at ¶5; Ex. E at ¶5). Moreover, Plaintiff's reliance on the Fifth Circuit's *Crawford* decision for this proposition is misguided. *See Crawford v. Western Elec. Co.*, 614

F.2d 1300, 1315 (5th Cir. 1980). Unlike the case at hand, *Crawford* addressed a claim of discrimination under a theory of disparate impact.[5] Further, *Crawford* did not hold that subjective criteria could *never* be considered in determining an employee's qualification.

In actuality, Plaintiff has no reasonable basis upon which to argue that that Jones Day's legitimate nondiscriminatory reason for its actions regarding Plaintiff's employment are false or are otherwise discriminatory. Plaintiff presents no competent evidence that Jones Day's decision regarding the GIS Manager position was motivated in any way by discrimination. To the contrary, Plaintiff's only "evidence" is rank speculation that she was discriminated against because of her race (*See*, *e.g.*, Plaintiff's Amended Complaint ¶4.10). While Plaintiff agues that Richardson unfairly evaluated her qualifications for the GIS Manager position, Plaintiff never even attempts to argue that Richardson's assessment of her was motivated by discrimination. Furthermore, Plaintiff's allegation that Jones Day discriminated against her when *Richardson* concluded that she was not qualified to serve as GIS Manager completely ignores the testimony of Whiting, the undisputed ultimate decision maker, and of Mark Metts and Scott Cowan, who both provided input into the GIS Manager hiring decision. Simply put, Plaintiff offers nothing other than her own speculation and her counsel's conclusory arguments to support her claim of discrimination. Such assertions are insufficient to establish pretext for discrimination. *See Elliot,* 714 F.2d at 564. As such, Plaintiff has no basis upon which to overcome Jones Day's legitimate, nondiscriminatory reasons for its actions taken toward Plaintiff, and Plaintiff's claim of discrimination fails as a matter of law.

B. Plaintiff Cannot Establish Her Claim of Retaliation

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[5] To demonstrate disparate impact, a plaintiff must demonstrate that an employer's facially neutral practice or test had an adverse impact on a particular protected group. *See*, *e.g.*, *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 (11th Cir. 1995). There is no disparate impact claim presently before this Court.

Plaintiff is unable to present a *prima facie* case of retaliation because she cannot prove that she engaged in protected activity, and there is no evidence to support a causal connection between any alleged protected activity and any adverse employment action. In her Opposition, Plaintiff asserts merely that her actions in taking Firm documents without permission and in tape-recording a conversation without the other parties' knowledge constitute protected activity because she took these actions to support her complaint of discrimination. In other words, Plaintiff's only argument is that because she would not have engaged in this misconduct "but for" her involvement in a complaint of discrimination, Jones Day's disciplining her necessarily constitutes retaliation. Plaintiff cites no authority for this position.

Plaintiff cannot establish a *prima facie* case because the actions upon which she relies in support of her retaliation claim do not constitute protected activity as a matter of law. As fully explained in Defendant's Motion, Plaintiff violated the Firm's Tape Recordings Policy when she recorded a conversation with the Houston office Human Resources Coordinator and the Firm Human Resources Director and Counsel without either party's knowledge. (*See* Motion at 8, 18-21, Ex. I at Exs. 5,6). Plaintiff also violated Jones Day's Firm Property Policy by accessing and taking copies of various Firm documents without authorization or approval (*Id.*). These actions by Plaintiff constitute breaches of trust against Jones Day and cannot be categorized as protected activity as a matter of law. *See Watkins v. Ford Motor Co.*, No. C-1-03-033, 2005 U.S. Dist. LEXIS 33140, at *17-*24 (S.D. Ohio Dec. 15, 2005) (citing *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996)).

Plaintiff's assertion that her actions are legally protected is contrary to established legal authority. Courts have held that "[a]n employee who steals confidential company documents, even documents that may evidence discrimination, has not engaged in protected activity."

Kempcke v. Monsanto Co., 132 F.3d 442, 446 (8th Cir. 1998) (citing *O'Day*, 79 F.3d at 762-64; *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985)); *see also Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980).[6] As a firm with over 2,200 lawyers that manages highly sensitive legal matters, trust and confidentiality is extremely important to the Jones Day organization. Plaintiff simply cannot argue that her actions in violating Firm policy constitute protected activity.

Furthermore, Plaintiff has failed to present a *prima facie* case of retaliation because she cannot demonstrate that she suffered an adverse employment action. Plaintiff relies exclusively on the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Company v. White* to support her argument that the counseling at issue constitutes a retaliatory event. 126 S. Ct. 2405 (2006). However, Plaintiff ignores the language in *Burlington Northern* emphasizing that the antidiscrimination provision of Title VII "does not protect an individual from all retaliation," and that "trivial harms" are not sufficient to state a claim for retaliation under Title VII. *Id.*; *see also Molina v. Equistar Chems., L.P.*, 2006 U.S. Dist. LEXIS 47075, No. C-05-327 (S.D. Tex. June 30, 2006)[7] (holding that a plaintiff who resigned after his employer requested that plaintiff meet with his supervisors and provided plaintiff with a "Last Chance Agreement" did not suffer an adverse employment action under *Burlington Northern*).

The counseling report issued to Plaintiff did not revoke any of her employment privileges at Jones Day, nor did it alter her employment status at the Firm in any way. Plaintiff was merely counseled that her actions constituted violations of Firm policy and was advised that any future policy violations could result in disciplinary action (*See* Defendant's Motion at Ex. I, Ex. 6).

[6] Furthermore, even where an employer wrongly believes an employee has violated company policy, it does not unlawfully discriminate if it acts on that belief. *Jeffries*, 615 F.2d at 1036 (finding no discrimination where the employer sincerely believed that the employee lacked authority to copy or disseminate the material in question); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977).

[7] Attached to Defendant's Motion as Exhibit "H."

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Plaintiff has no reasonable basis upon which to argue that this action constituted a "material harm" as contemplated by *Burlington Northern*. Furthermore, it is unreasonable for Plaintiff to suggest that she is now somehow precluded from obtaining evidence from Jones Day; Plaintiff is free, as always, to subpoena[8] Jones Day for any such documents or to issue a request to Jones Day through the parties' legal counsel. For these reasons, Plaintiff has failed to meet her burden of establishing that her counseling constituted an adverse employment action as a matter of law.

Finally, Plaintiff has presented no evidence to demonstrate a causal connection between her filing a complaint of discrimination against Jones Day and her counseling, nor has she presented any evidence suggesting that Jones Day's actions were retaliatory. Plaintiff simply asserts summarily that she would not have been disciplined "but for" her involvement in a complaint of discrimination. Conclusory allegations, unsubstantiated assertions, and subjective beliefs are not competent evidence in support of a claim of retaliation. *Scrivner v. Socorro Ind. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999). Furthermore, a plaintiff is only able to establish a causal link when she can demonstrate that without some explanation from the defendant, it is more likely than not that the actions in question were based upon retaliatory criterion. *See De Anda v. St. Joseph Hosp*. 671 F.2d 850, 857 (5th Cir. 1982) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S. Ct. 2943, 2949 (1978)). Plaintiff presents no evidence even purporting to show that Jones Day acted with a retaliatory motive in counseling her.

Plaintiff's argument that Jones Day's "delay" in disciplining Plaintiff is somehow indicative of a retaliatory motive is illogical at best. Plaintiff filed her lawsuit in September of 2005. Jones Day learned of Plaintiff's misconduct several months later and formally counseled her on June 20, 2006, after a significant amount of discovery had been completed in this litigation. Had Jones Day acted with motivation to "chill" Plaintiff's efforts in this lawsuit, it

[8] The discovery deadline in this case was November 22, 2006.

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would have had no incentive to delay its counseling of Plaintiff. Plaintiff simply has no legal or evidentiary basis upon which to argue that Jones Day unlawfully retaliated against her when it counseled her for blatantly violating Firm policy. Accordingly, this Jones Day is entitled to summary judgment as a matter of law.

III. CONCLUSION

For the above-stated reasons, Jones Day prays that the Court grant Defendant's Motion for Summary Judgment on all of Plaintiff's claims against Jones Day. Jones Day further requests all other and further relief, at law or in equity, to which it may show itself to be justly entitled.

Respectfully submitted,

/s/ Shauna Johnson Clark by permission
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CERTIFICATE OF SERVICE

This pleading was served in compliance in compliance with Rule 5 of the Federal Rules of Civil Procedure by electronic transmission on this 11th day of December, 2006, to counsel listed below:

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